[redacted]

INDEX

Page

CITATION TO OPINION BELOW 2

JURISDICTION.....2

QUESTIONS INVOLVED 3

REASONS FOR DENYING THE WRIT 5

I. The Issue Of Whether Or Not The "Free Speech" Rights Of Petitioners Have Been Violated By Reason Of The Alleged Over-Breadth Or Vagueness Of The Attorney's Oath Contained In Sec. 256.29 (1) Wis. Stats. Is Res Judicata, Said Issue Having Been Decided Adversely To Petitioners In *Eisenberg et al. v. Boardman, et al.* (1969) 302 F. Supp. 1360 From Which Petitioners Have Not Appealed.....5

II. The Findings Of Fact Of The Wisconsin Supreme Court In An Original Action In That Court Are Not Subject To Review Here If Supported By The Record 10

No Double Jeopardy Involved 20

III. Petitioners Are Not Subject To Prosecution Under Any Ex Post Facto Law.....22

IV. No Constitutionally Protected Speech Activities Of The Petitioners Were Violated And There Was No Denial Of Procedural Due Process 23

CONCLUSION.....27

Page

CITATIONS

CASES

Cameron v. Johnson (1968) 390 U.S. 611 24

In re Cannon (1932) 206 Wis. 374, 240 NW 441 4,21,22,23

Eisenberg v. Boardman (1969 W.D. Wis.)
302 F. Supp. 1360 5,8,24,28

In re Glenn (1964) 256 Iowa 1233,
130 NW (2) 672, 12 ALR (3) 1398 7

Integr. ion of Bar Cases

(1943) 244 Wis. 8, 11 NW (2) 604 21

(1946) 249 Wis. 523, 25 NW (2) 500 21

(1956) 273 Wis. 281, 77 NW (2) 604 21

(1958) 5 Wis. (2) 618, 93 NW (2) 601 21

Lathrop v. Donahue (1960) 10 Wis. (2) 230, ... 21
102 NW (2) 404, 367 US 820 21

State ex rel. Baker v. County Court (1965)
29 Wis. (2) 1, 138 NW (2) 162, 19 ALR (3) 1089 21

State ex rel. State Bar v. Bonded Collectors (1967)
36 Wis. (2) 643, 154 NW (2) 250, 27 ALR (3) 1138 21

State ex rel. State Bar v. Keller (1961)
16 Wis. (2) 377, 114 NW (2) 685, 21 Wis. (2) 100,
123 NW (2) 905, cert. denied 377 U.S. 964 21

State ex rel. Reynolds v. Dinger (1961)
14 Wis. (2) 193, 109 NW (2) 685 21

Page

State v. Eisenberg (1970)
48 Wis. (2) 364, 180 NW (2) 529 2

State v. Maddock (1940)
234 Wis. 441, 291 NW 347 12

State v. Preston (1968) 38 Wis. (2) 582,
159 NW (2) 684, cert. denied 393 U.S. 981 11

Towne v. Eisner (1918)
245 U.S. 418, 38 S. Ct. 158, 159 8

United States v. Yellow Cab (1949) 338 U.S. 338 20

Bradley v. Fisher (1871)
13 Wall 335, 20 L. Ed. 646 9

State v. Cannon (1928)
196 Wis. 534; 221 N.W. 603; Ex parte Secombe,
19 How. 9, 15 L. Ed. 565; Ex parte Garland,
4 Wall 333, 18 L. Ed. 366 10

In re Sawyer (1959) 360 U.S. 622,
79 S. Ct. 1376, 3 L. Ed. 2d 1473 28

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend. I 3

U.S. Const. Amend. XIV 3

Wis. Stats., Sec. 256.28 (8) 21

Wis. Stats., Sec. 256. 28 (12) 10

Wis. Stats., Sec. 256. 29 (1) 3

Page

TEXTS

12 ALR (3) 1408 7

41 Am. Jur. "Pleading" #77, page 344-345 25

54 Am. Jur. "United States Courts" #224, page 857-858.....20

98 C.J.S. "Witnesses" # 538, page 475-476 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1537

ALAN D. EISENBERG and
SYDNEY M. EISENBERG,
Petitioners,

v.

STATE OF WISCONSIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Wisconsin, Respondent, by its attorneys Rudolph P. Regez and Warren H. Resh, present this brief in opposition to the granting of the Petition for Certiorari to the Supreme Court of Wisconsin by Alan D. Eisenberg and Sydney M. Eisenberg, Petitioners.

OPINION BELOW

As indicated in the Petition the judgment of the Wisconsin Supreme Court is officially reported in 48 Wis. (2) 364, and unofficially in 180 NW (2) 529, having been decided on November 3, 1970. Motion for rehearing was denied with costs on January 5, 1971.

JURISDICTION

Alleged violation of constitutional rights under the United States Constitution in lawyer disciplinary proceedings falls within the jurisdiction of this court.

However, we strongly urge that no constitutional rights of the Petitioners were violated as clearly appears in the decision and judgment of the Wisconsin Supreme Court.

QUESTIONS PRESENTED

1. Is the statutory oath of attorneys under Sec. 256.29 (1), Wis. Stats., requiring them to maintain the respect due to courts and judicial officers so vague and overbroad as to violate rights of free speech under the 1st and 14th Amendments of the United States Constitution?

2. Are the 1st and 14th Amendment rights of attorneys violated when they are disciplined for:

   (a) Publicly charging a sitting judge with conduct for which a criminal warrant could issue but without taking steps to report such conduct to the proper authorities?

   (b) Publicly predicting that the judge would resign for personal reasons rather than face prosecution?

   (c) Arranging and paying for newspaper advertisements soliciting complaints against the judge?

   (d) Pressuring the judge unwillingly to appoint them to an advisory committee concerning the administration of his court?

   (e) Forcing the judge to publicly read a press release announcing their appointment to such committee for the purpose of aggrandizing themselves and of demonstrating to the public their dominance over the judge?

3. In a state where attorney disciplining proceedings are conducted as original actions in the State Supreme Court are the attorneys subjected to double jeopardy if the Supreme Court declines to follow the findings and recommendations of the Referee it has appointed to hear the matter and makes its own findings based on its own examination of the record and transcript?

4. Did the charges in the complaint against the Petitioner lack specificity with the result that they were prosecuted under a vague and broad statement of conduct so as to deny them procedural due process of law guaranteed by the 14th Amendment?

5. Were the Petitioners subjected to prosecution under an ex post facto law by reason of the fact that the Wisconsin Supreme Court allegedly failed to follow the guidelines of its earlier decision in the case of In re *Cannon* (1932) 206 Wis. 374, 240 NW 441?

REASONS FOR DENYING THE WRIT

I. The Issue Of Whether Or Not The "Free Speech" Rights Of The Petitioners Have Been Violated By Reason Of The Alleged Overbreadth Or Vagueness Of The Attorney's Oath Contained In Sec. 256.29 (1) Wis. Stats. Is Res Judicata, Said Issue Having Been Determined Adversely To The Petitioners In *Eisenberg, et al. v. Boardman,* et al. (1969) 302 F. Supp. 1360, From Which Decision Petitioners Have Not Appealed.

Upon the filing of the complaint against petitioners and before any hearing was held, they brought an action in the United States District Court for the Western District of Wisconsin, seeking to enjoin the proceedings. *Eisenberg, et al v. Boardman, et al.* 302 F. Supp. 1360. That action challenged the constitutionality of the disciplinary proceeding on "free speech" grounds and advanced the same arguments presented to this court in the instant petition. A three judge court was impaneled by Hon. James Doyle because of petitioners' attack on the attorney's oath as set forth in W. S. 256.29, which requires an attorney to swear he will "maintain the respect due the courts of justice and judicial officers," and which statute further declares any violation of that oath to be unprofessional conduct.

The District Court, in upholding the statute, said: "It wholly meets the challenge of overbreadth" when considered with prior pronouncements of the Wisconsin Supreme Court.

Petitioners sought no review of the District Court's decision and it is now *res judicata.*

In the same action petitioners challenged the allegations of the complaint asserting that the conduct charged constitute constitutionally protected speech activities. The District Court had the complaint before it, and it concluded that the

allegations did not stop with the charge of making statements, but

> "Rather it charges a course of conduct which is alleged to be unprofessional and the fact that speech is *intermingled with conduct* does not endow the conduct with constitutional protection where the state can properly forbid or regulate the conduct as a whole." (E.S.) p. 1365

The Wisconsin Court in its "*De Novo* review" of the entire record of the proceedings held pursuant to the complaint, made factual findings. When this court considered those findings, it is only concerned as to whether or not they have fair support in the record. The constitutional issues raised by defendants were considered and disposed of by the District Court's decision. That court specifically found that the complaint alleged conduct beyond that protected by the first and fourteenth amendments. With that result, it was then for the Wisconsin Supreme Court to determine whether the allegations of the complaint had been proved — after giving the defendants an opportunity to answer the accusations made against them. That court found that the allegations of the complaint were proved, and "that the evidence clearly and satisfactorily establishes that both defendants are guilty of irresponsible and unprofessional conduct."

The Wisconsin Court found *inter alia* that petitioners had engaged in a course of conduct which "pressured the judge unwillingly to appoint them to an advisory committee concerning the administration of his court," and "forced the judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the judge."

That which petitioners label "free speech" is simply a part of defendants' overall harassment, intimidation and ultimate subjugation of Judge Krueger.

It has never been held that the constitutional guaranties of freedom of speech constitute an "invitation to the dance" so far as blackmailing a judge is concerned.

The Wisconsin Court in its decision at page 381-382, referred to defendants' newspaper ads soliciting complaints against Judge Krueger with the following comment:

> "The solicitation of complaints against a judge by newspaper advertisements is in itself a weapon of awesome intimidation, especially where, as here, the defendants clearly intended to use the results to intimidate the Judge. The defendants did not request in (sic) any advertisements that replies be referred to the proper authorities. On the contrary, the record indicates the defendants were obtaining and keeping any information acquired for their own use against the Judge.
>
> "Canon 1 of the Canons of Professional Ethics of the American Bar Association, which canons were adopted in Rule 9 of the Rules for the Integration of the Bar by the Wisconsin Supreme Court, 273 Wis. (1956), provides in part:
>
> 'Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty, of the lawyer to submit his grievances to the proper authorities. . .'
>
> "We think the solicitation of complaints through newspaper advertisement constituted, under the circumstances, a part of a program of intimidation of a judge and thus went beyond the attorney's right of free speech."

The action of Alan Eisenberg in stating that a felony warrant was to be requested against Judge Krueger, but with no attempt to follow through by presenting the facts to the proper authorities as required by Canon 1, places the instant case in exactly the same posture as that of *Re Glenn*, (1964) 256 Iowa 1233, 130 NW (2) 672, 12 A.L.R. (3) 1938:/[1]

> "The final charge which was sustained by the trial court concerns the attempt of the accused to file a complaint charging Judge Dullard with the criminal offense of perjury. Having prepared such a complaint, he took it to two judges of the Second District Court, asking that it

---

/[1]See 12 *A.L.R.* (3) 1408 for an Annotation on the subject *"Attorneys Criticism of Judicial Acts as Ground of Disciplinary Action."*

> be filed. They advised him to take it before the grand jury. He also went to the county attorney, who likewise advised him to appear before the grand jury. He gave a copy of the complaint to a reporter for the Ottumwa Daily Courier, but requested him to withhold publication until it was filed. Although the county attorney was willing to present the matter to the grand jury, the accused did not see fit to appear there or to urge his charge. He was entitled to do so; but his failure to accept the advice of the two district judges and of the county attorney leads to the conclusion that he wanted to embarass Judge Dullard and to obtain publicity more than he desired a bona fide, presentation of the matter. . . .
>
> "Here again Canon 1, supra, becomes material. If the accused thought there was a case of perjury maintainable against Judge Dullard, he should have been willing to accept the advice of the two able district judges and submit it to a grand jury. He did not try to protect the court from criticism that might well prove to be unjust; on the contrary, he attempted a course of procedure which would certainly subject the court to unfortunate publicity, no matter what the final result might be. . ." P. 1406

The required attorney's oath under W. S. 256.29 (1) is not, as petitioners would seem to imply, a lonely abstraction to be studied as some sterile specimen in a vacuum chamber under a microscope. Rather, in the words of Justice Holmes:

> ". . .A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to *circumstances* and the time in which it is used." (E.S.)
>
> *Towne v. Eisner* (1918) 245 U.S. 418, 425

As the District Court pointed out in *Eisenberg v. Boardman*, supra, the character of the speech must be evaluated in the terms of the conduct with which it is intermingled, and when so considered there is here present a clear cut case of unprofessional conduct under the oath which petitioners attack and one well beyond the "free speech" protection of the Constitution.

This court early recognized the importance of an attorney's obligations, see *Bradley v. Fisher* (1871) 13 Wall 335, 20 L. Ed. 646, where appears at pages 355-356 the following:

> "But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, *but to maintain at all times the respect due to courts of justice and judicial officers.*/[1] This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice Gibson in the case of *Austin and others,* "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. *No one would pretend that an attempt to control the deliberation of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice.* And an enormity of the sort, practiced but on a single judge would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll." (E.S.)

While no physical violence was entailed in defendants' conduct — nevertheless, their activities were such as to make

/[1]Note similarity to W.S. 256.29 "Attorney's oath. . .I will maintain the respect due the courts of justice and judicial officers."

Judge Krueger subordinate to them, which resulted in a failure of judicial independence "so indispensable to the administration of justice."

II. The Findings Of Fact By The Wisconsin Supreme Court In An Original Action In That Court Are Not Subject To Review Here If Supported By The Record.

Throughout the petition there is the implicit argument that the Wisconsin Supreme Court should have been bound by the findings of the Referee appointed by the court to conduct the hearing in its behalf. For it to have done so would have been for it to abdicate its responsibility, the inherent and exclusive power which the court possesses to inquire concerning the professional conduct of members of its bar./[1]

In at least a half a dozen places in the petition, both in the text as well as in the headings, reference is made to a "trial do novo" on the theory that there were two trials, one before the Referee, and a second trial or a trial de novo in the Wisconsin Supreme Court.

This is a completely distorted picture which wholly overlooks the procedural machinery for the disciplining of attorneys in Wisconsin by an original action in the Supreme Court of the state. The Wisconsin Court de novo examination of the record was not a trial de novo; there was no trial de novo before the Wisconsin Supreme Court as stated at page 19 of the petition.

In may, many places throughout the petition, reference is made to the "trial referee" instead of to the "referee," the term used in Sec. 256.28 (12) Wis. Stats. for the designation of this functionary of the Supreme Court. That statute provides:

/[1]State v. Cannon (1928) 196 Wis. 534; 221 N.W. 603; Ex Parte Secombe, 19 How. 9, 15 L. Ed. 565; Ex parte Garland, 4 Wall 333, 18 L. Ed. 366.

> ". . . The Supreme Court shall appoint a referee to hear the cause and report his findings to the court, together with his recommendations as to the judgment to be made . . ."

Coining the term "trial referee" instead of using the term "referee" as set forth in the statute and in the numerous decisions of the Wisconsin Supreme Court in disciplinary proceedings requires the assumption that petitioners are hoping by a none too subtle psychological ploy to lull this court into unwitting acceptance of their two level court concept, - a trial court and an appellate court, in disciplinary proceedings, whereas as has been repeatedly emphasized throughout this brief we are dealing only with an original action in the Supreme Court of Wisconsin. There is no separate trial court, and the proceeding loses none of its basic structure as an original action and as a single action by the mere fact that to use the language of the Wisconsin Supreme Court in *State v. Preston* (1968) 38 Wis. (2) 582, 159 N.W. (2) 684:

> "The function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court."

This court then went on to say immediately following the above language at page 588c:

> "While the recommendations of the referee are given consideration, *we look* to the record and transcript to determine whether the facts apparent therein warrant some form of discipline . . ." (E.S.)

That this is the correct rule is fortified by the fact that the United States Supreme Court denied the petition for a Writ of Certiorari in *Preston*. 393 U.S. 981.

Thus we are concerned here not with the findings of the referee or his recommendations all of which are advisory only. Rather we are concerned with the findings and order of the Supreme Court itself. It did not sit as an appellate court to pass upon alleged errors of the referee, instead as a court of original jurisdiction, and as such it could or could not

follow the findings and recommendations of the referee it appointed to hear the matter. See for example *State v. Maddock* (1940) 234 Wis. 441, 291 N. W. 347, where it chose not to do so, saying:

> ". . . We have so many misgivings concerning the truthfulness and credibility of the complainant, upon whose testimony this proceeding is principally based, that we cannot approve of the recommendations of the referee."

The findings of the Wisconsin Supreme Court are set forth succinctly at page 379 of 48 Wis. (2) as follows:

> "After a careful review of the record and transcript made in these proceedings, we find:
>
> (1) That Alan Eisenberg publicly charged Judge Krueger with conduct (unspecified) for which a criminal warrant could issue;
>
> (2) That Alan Eisenberg predicted the Judge would resign for 'personal reasons' within a short period rather than face prosecution;
>
> (3) That Alan Eisenberg arranged for and Sydney signed checks in payment of newspaper advertisements soliciting complaints against Judge Krueger;
>
> (4) That in concert the defendants pressured the Judge unwillingly to appoint them to an advisory committee concerning the administration of his court;
>
> (5) That in concert the defendants forced the Judge to publicly read a press release announcing their appointment for the purpose of aggrandizing themselves and demonstrating their subjugation of and their dominance over the Judge; and
>
> (6) We find that the above acts of the defendants constitute unprofessional conduct tending to bring the courts into disrepute and contempt and that such conduct is contrary to the duties of the defendants as licensed attorneys, and in violation of their oaths as attorneys, taken pursuant to sec. 256.29, Stats."

These findings are amply justified on the basis of the evidence as discussed by the court in the pages of the opinion preceding them.

Some consideration of the facts all as found by the court is important in order analyze the legal points raised by petitioners.

It was charged in the complaint that the petitioners had pursued a course of vindicative and reckless harassment and psychological persecution against Milwaukee County Judge Krueger by causing to be circulated statements that they knew or should have known, would reach him, to the effect that he was guilty of conduct for which a criminal warrant could be issued; that he would resign from the bench for personal reasons within 60 or 90 days or such a warrant would be issued; and that these statements were followed by a series of newspaper ads in which the petitioners participated, soliciting complaints against the judge, all of which caused the judge great mental suffering and anguish culminating in death by his own hand.

The Wisconsin court found true a newspaper reporter's testimony as to the prediction by one of the petitioners that the judge would resign or a felony warrant would be issued against him, and that Alan Eisenberg said:

> "We have got him good, we have got private detectives working on him . . ." Page 372. 48 Wis. (2)

The court further found that the judge sent an emissary to see Sydney Eisenberg in the hope of arranging a settlement of the dispute between the judge and the petitioners, and the emissary was told by Sydney Eisenberg:

(1) "I spent a lot of money getting information on this man. We could chop him up, Ed, and we are going to do it."

And

(2) "I'll have to talk to Alan, and if he (Krueger) will agree to what Alan and I decide, then we will have peace..." Page 373. 48 Wis. (2)

Also Sydney Eisenberg told the emissary:

> "All right, we can resolve it, end it, but he has got to give a press release that Alan and I tell him to give." Page 373. 48 Wis. (2)

After the release was prepared Alan Eisenberg appeared in a Milwaukee hotel coffee shop with copies of the release and approached a group of people, saying:

> "I finally did it. — I finally made it. Have got him[1] over a barrel." Page 374. 48 Wis. (2)

One of the members of the group expressed doubt that Judge Krueger would issue the release, to which Alan Eisenberg replied that it would make no difference and he would still have the judge off the bench in 60 days. (Page 374.) At the same time he made a statement that next he would get Judge Moser, another Milwaukee judge.

The next day the judge's bailiff summoned reporters to hear the judge read the release. Alan Eisenberg was standing outside the courtroom handing out copies of the release, and he there publicly said to an attorney who was present:

> "Come on, Orville, — I want you to watch Judge Krueger make an ass out of himself." ...Page 375. 48 Wis. (2)

The judge read the release in chambers and again from the bench. The release stated that the judge had appointed an advisory committee of three. Two of these were the petitioners. Page 375. 48 Wis. (2)

In the course of the preparation of the release Sydney Eisenberg told the judge's emissary that it would end the dispute but:

> "The only thing you got to worry about is to get the broad and tell her to keep her mouth shut and everything will be all right . . ." Page 373. 48 Wis. (2)

From this it would appear that the weapon which petitioners used to bring the judge to his knees was an affair

---

[1] Referring to Judge Krueger.

which the judge admitted having had with a woman attorney. Page 375. 48 Wis. (2)

There is no point in exploring the findings of the referee, which are not findings of the court under *Preston,* supra. To further discuss such rejected findings would only confuse the issue before the court. There was no trial *de novo* in the Supreme Court, since there was but one proceeding and no appeal.

Obviously in a disciplinary proceeding such as this there are bound to be conflicts in the testimony, and as stated above the Supreme Court itself is the trier of the facts in an original action regardless of its use of a referee for hearing purposes. *Preston,* supra.

Moreover, here the referee erred in initially receiving testimony purporting to impugn the general character of a principal state witness, with the state being denied the opportunity to enter contrary evidence both as to the general character of the witness and as to the specific traits of truthfulness and veracity. Page 378.

Numerous witnesses testified in plaintiffs' behalf. Petitioner, Alan Eisenberg, took the stand and as to his testimony the Wisconsin Court found:

> "During these proceedings Alan Eisenberg gave testimony which directly conflicts with the testimony of thirteen witnesses. *The record shows that as to any testimony which supported the allegations of the complaint, Alan refutes the same by labeling it to be false."* (E.S.) Page 377. 48 Wis. (2)

Consider the following statements of Alan Eisenberg in referring to the testimony of thirteen of plaintiff's witnesses:

1. JOSEPH PECOR:

> "When he (Pecor) says that I told him on that telephone conversation that I had something on Judge Krueger, that just makes me want to puke because that is such a vicious lie. I am ashamed of Joe Pecor for saying

something like that because that is so sickening. It's ridiculous. I absolutely never told Joe Pecor anything like that." (R. 2936)

"I deny saying to Pecor, 'I have something on him. Some day over a few beers I'll tell you how I got him to do this.'" (R. 3122)

2. RONALD HAASE:

"I never at any time said — that I was going to get a felony warrant for Judge Krueger, that is without a doubt the most horrible lie that one person ever said about another that I have heard in an awfully long time. I never said that I was going to get a warrant. We never discussed warrants. (R. 2966 - 2967)

I "absolutely never" told Haase that I had something involving Judge Krueger's personal life. (R. 2972)

I never said to Haase "do you know what the son-of-bitch (Krueger) did to me today". (R. 3124)

3. WILLIAM JANZ:

"It was — he might as well have charged me with raping somebody, because this was a completely false accusation, and I resented it very much, and that's why I told him it was a dirty lie. He had no right to even make a statement like that." (R. 3047)

"I never even insinuated to that man that I knew anything personal whatsoever about Judge Krueger." (R. 3037)

4. EDWARD CAMERON:

Mr. Eisenberg denied all material portions of this witness's testimony. His most significant statement relating to Cameron, however is:

"If Ed Cameron said it it's a lie." (R. 2890)

5. JOHN STALLARD:

Mr. Stallard testified:

"He (Alan) also mentioned that he had been checking into a possible felony warrant. He was shouting this idea around. He was quite insistant he could do this in one manner or another." (R. 1481)

Q. What did he say about a felony warrant?

A. He didn't say specifically what he had in mind, but he felt sure he could get a felony warrant.

Q. Felony for who?

A. For Judge Krueger.

(R. 1481)

"-He said he had checked into it, talked to someone about a felony warrant, of how he could get a felony warrant. He said he thought he could." (R. 1523)

"I think I told him he was being silly, and he said 'You'll see, I'll have him off the bench in sixty to ninety days, you will see.'" (R. 1484)

With reference to this testimony by Reporter Stallard, Eisenberg testified:

"I never at any time said — that I was going to get a felony warrant for Judge Krueger -. I never said that I was going to get a warrant. We never discussed once." (R. 2966 - 2967)

6. MARY ANN SHOLTIS:

"I deny telling Mary Ann Sholtis not to tell anyone that the Eisenbergs had anything to do with it." (R. 3118)

"I definitely deny ever telling her that she shouldn't tell people who gave them to her."/1 (R. 3119)

7. WILLIAM JENNARO:

Mr. Jennaro, an assistant district attorney, testified that immediately before the press release was read by Judge Krueger, Alan said to him, "Listen to this, I have got him." (R. 647)

In reference to this testimony, Alan Eisenberg testified:

"I said something like, 'We got this done.' or something like that. I don't remember exactly what my words were, but it was nothing to indicate that I was hording (sic) it over the judge." (R. 2955 - 2956)

8. DANIEL PETERSON:

"I didn't ever remember saying that. I don't remember feeling that way about Judge Krueger."/2

"I will have to deny it. I don't remember making it."

9. RITA LAWLER:

"-she testified, number 1, that I said that 'I was going to chop him up' and that's an outrageous bald-face lie-" (R. 3049)

10. WILLIAM HALE:

"I never told Hale that I knew something about his (Krueger's) personal life or anything like that,-" (R. 3039-3040)

11. ORVILLE PITTS:

Mr. Pitts testified that on August 26, 1968, the day that Judge Krueger read the press release, that Alan Eisenberg saw him in the Safety Building and said:

"Come on, Orville, I want you to go somewhere with me. 'I said, 'Where?' He said, 'I am going to Judge Krueger. I want you to see something. I want you to watch Judge Krueger make an ass out of himself.' " (R. 509)

In reference to this statement, Alan's testimony was:

"I never said anything to him about my — that I was going to make an ass out of Judge Krueger." (R. 2948)

"I know I never said it. I don't care what Pitts says." (R. 2963)

This last statement by Mr. Eisenberg characterizes his testimony — his attitude. I didn't say it — I didn't do it regardless of what anyone says.

/1 Having reference to printed flyers, copies of the newspaper ad which Alan Eisenberg requested this witness to pass out in front of the court house.

/2 Peterson testified that Alan Eisenberg, in Judge Krueger's court, walked away from the bench and said: "The prick". (R. 1056)

12. ALICE BOETTCHER:

"I expressly did not show it to Mrs. Boettcher, because Mrs. Boettcher is a busybody. She is a nosey lady. She saw me showing it to him, and that's why she wanted to see it, and she asked me for a copy. I didn't read it to her. I didn't show it to her. I didn't have any of the conversations that she claims was had on that night." (R. 2940-2941)

"I never did it or any of the things Mrs. Boettcher said." (R. 3101)

Alan testified further that he did not, at the Belmont Hotel, state that Krueger would read the press release or be off the bench in reference to that statement he said, "That is a lie." (R. 3104) He emphatically added:

"First of all, you are assuming what Mrs. Boettcher said is true. I *categorically* deny the testimony she gave here in court." (R. 3107) (E.S.)/[1]

13. MRS. ROSE SUSSMAN:

"-One of the reasons I don't talk with Mrs. Sussman is because I have always considered Mrs. Sussman a bigot-" (R. 2941)

"There wasn't a single word said about Judge Moser/[2] or anything like that. Where Mrs. Sussman gets that from I'll never know. I never said anything like that. All I did was talk about the press release." (R. 242)

Certainly the court had every right to weigh the interest of Alan Eisenberg in the outcome of the hearing as against the testimony of the thirteen witnesses who contradicted him. See 98 C.J.S. "Witnesses" # 538, p. 475-6

The findings of fact of the Wisconsin Supreme Court must be deemed as conclusive under the well established doctrine

/[1]The referee found "Alan did not deny categorically the statements attributed to him by Mrs. Boettcher and Mrs. Sussman; perhaps because as I have searched the record, he was never asked whether or not he made such statement." (Ref. Rep. P. 9)

/[2]Mrs. Sussman, as did Mrs. Boettcher, testified that when Alan Eisenberg left their table he said, next he would get Judge Moser (R. 566-623)

that the appellate court accepts the findings and conclusions of the lower court as being determinative on conflicts.[3]

While Rule 52 of the Federal Rules of Civil Procedure does permit the correction of clear error as to findings of fact, a choice by the trier of facts between two permissible views of the weight of the evidence is not "clearly erroneous" within such rule. See *United States v. Yellow Cab Co.* (1949) 338 U.S. 338, *where the court said that it should not be asked for what virtually amounted to a trial de novo in the United States Supreme Court.*

On the basis of the foregoing, this court is respectfully requested to wholly disregard the petitioners' structuring of the facts around the referee's findings, findings which were rejected by the Wisconsin Supreme Court, or the testimony of witnesses for the petitioners which testimony conflicted with that of the disinterested witnesses of the state. The Wisconsin Supreme Court made the only logical choice between the two permissible views of the evidence, and the record gives overwhelming support to its determinations.

No "double jeopardy" involved

The argument just advanced applies to petitioners' contention of "double jeopardy."

Where, as here, attorney disciplinary proceedings are conducted as an original action in the state supreme court the attorney so disciplined is not subjected to double jeopardy if the supreme court declines to follow the findings and recommendations of the Referee whom it appointed to hear the matter but rather after its own de novo examination of the record and evidence make its own findings and order thereon.

Wisconsin procedures require that when an attorney is charged with unprofessional conduct, a complaint shall be filed

[3] See 54 *Am. Jur.* "United States Courts" #224, P. 857-858 and footnote 13 citing numerous United States Supreme Court decisions to that effect.

with the justices of the Supreme Court, W. S. 256.28 (8) thereafter, and pursuant to W. S. 256.28 (12) the Supreme Court appoints a Referee to hear the cause and to report his findings to that court with his recommendations as to judgment.

No other court such as a trial court of general jurisdiction has anything to do with such a case.

The Supreme Court of Wisconsin and that court alone has the inherent responsibility and power to regulate the practice of law, including the authority to license as well as to revoke or suspend licenses, and to exclude unlicensed persons from the practice./[1]

Indeed it was pointed out in the case of *In re Cannon* (1932) 206 Wis. 374, 379, 240 N. W. 441, that the Supreme Court of Wisconsin may not abdicate its responsibility with respect to regulation of law or delegate it to others.

Hence the contention that any other court or agency has the power to make findings or recommendations in disbarment cases that will bind the Supreme Court of Wisconsin is as completely fallacious as the contention that there is a trial "de novo" in the Supreme Court when it decides to reject the findings and recommendations submitted by the Referee and make its own findings and judgment based on the same

---

/[1] *In re Cannon (1932) 206 Wis. 374, 240 N.W. 441*

Integration of Bar Cases

(1943) 244 Wis. 8, 11 N.W. (2) 604
(1946) 249 Wis. 523, 25 N.W. (2) 500
(1956) 273 Wis. 281, 77 N.W. (2) 604
(1958) 5 Wis. (2) 618, 93 N.W. (2) 601

Lathrop v. Donahue (1960) 10 Wis. (2) 230, 102 N.W. (2) 404, affirmed 367 U.S. 820
State ex rel. Reynolds v. Dinger (1961) 14 Wis. (2) 193, 109 N.W. (2) 685
State ex rel. State Bar v. Keller (1961) 16 Wis. (2) 377, 114 N.W. (2) 685, 21 Wis. (2) 100, 123 N.W. (2) 905, cert. denied 377 U.S. 964
State ex rel. State Bar v. Bonded Collectors (1967) 36 Wis. (2) 643, 154 N.W. (2) 250, 27 ALR (3) 1138
State ex rel. Baker v. County Court (1965) 29 Wis. (2) 1, 138 N.W. (2) 162, 19 ALR (3) 1089

testimony and evidence. The question might well be asked under petitioners' theory of the case: Are they not now seeking a trial "de novo" in this court?

III. Petitioners Are Not Subject To Prosecution Under Any Ex Post Facto Law

It appears in Sec. V of their petition that the petitioners claim they have been prosecuted under an *ex post facto* law by reason of the fact that the Wisconsin Supreme Court allegedly failed to follow the guidelines of its earlier decision in the case of *In re Cannon* (1932) 206 Wis. 374, 240 N.W. 441.

The facts in *Cannon* were determined to be so dissimilar from those in the instant case so far as the element of "free speech" is concerned that the case was not cited in the original brief. However, contrary to the contention of the petitioners at page 40 of the petition to the effect that respondent did not refer to the *Cannon* case until the Motion for Rehearing below, respondent did distinguish the "free speech" problem as presented there from the question as presented here at some length in the course of oral argument to the Wisconsin Court and pointed out to it that *Cannon* was inapplicable.

In *Cannon* one of the minor questions there before the court was whether Mr. Cannon's conduct while suspended from practice of law was such as to require denial of his re-instatement.

During the period of his suspension he was a candidate for Justice of the Supreme Court and also a candidate in opposition to Circuit Judge Aarons. At page 405 the court found that in these campaigns and in other public utterances he indulged in reckless and impetuous criticism of the courts, which criticism was justified by no basis in fact.

The court considered this to be permissible free speech.

However, the important distinction for present purposes is that the court pointed out at page 404 that the Board of State Bar Commissioners reported that during the period of his suspension, Mr. Cannon had not charged any judicial officer with criminal misconduct or immorality, and at page 405 said:

> ". . . It appears from the proceedings had before the State Board of Bar Commissioners that Mr. Cannon now disclaims any intention or purpose of charging any judicial officers with any criminal misconduct or immorality, or any malfeasance in office...."

The conclusion is inescapable that if the court had found that Mr. Cannon had (as in the instant case) publicly charged a sitting judge with conduct for which a criminal warrant could issue, or that he had predicted the judge would resign for personal reasons rather than face prosecution, or had solicited complaints against a judge by newspaper advertisements, such conduct would have been considered unprofessional and of such a character as to preclude re-admission to the Bar.

That is the distinction, and when properly read in the light of the facts the *Cannon* case supports the position of the State rather than that of the Petitioners.

IV. No Constitutionally Protected Speech Activities Of The Petitioners Were Violated And There Was No Denial Of Due Process

The Petition herein is based not on the facts found by the Wisconsin Supreme Court which as previously pointed out are controlling but rather on the Petitioners' version of the facts and testimony of Petitioners which was in conflict to that of some 13 witnesses called by the State. To accept the Petitioners' version of the conflicting testimony it would be necessary to conclude that each of the 13 State witnesses was guilty of perjury and willing to lie under oath, all without any apparent motive as distinguished from the motivation

of extreme self interest of the Petitioners in the giving of their testimony.

It is difficult to segregate and separately treat the arguments of the Petitioners under the five headings listed in their Petition, since their points overlap each other. However, throughout the Petition an attempt is made to classify the findings of the Wisconsin Supreme Court as being bottomed on and concerned with speech activity of the Petitioners. (Note for example the last paragraph on page 28 of the Petition.)

We have already answered the "free speech" argument of the Petitioners and believe it is amply met in *Eisenberg v. Boardman* (1969) 302 F. Supp. 1360, where it was made clear that speech activity involving judicial harassment, accusation of crime, intermingled with conduct is not constitutionally protected. See also *Cameron v. Johnson* (1968) 390 U.S. 611, 617.

The Petitioners also complain that the complaint was lacking in details sufficient to give them adequate notice of what they had done and that hence there was a lack of due process. (See page 47 of the Petition.)

No extended argument is required to meet a contention so wholly lacking in merit.

It is difficult to see how the complaint could have been more specific without actually pleading evidence. The charges in the complaint were summarized at pages 367 - 369 of the Wisconsin Supreme Court decision. Briefly they are:

1. Public circulation of statements that Judge Krueger was guilty of conduct for which a criminal warrant could be issued.
2. That he would resign within 60 or 90 days or such a warrant would be issued.
3. That Petitioners ran a series of advertisements in the newspapers (the names of the papers and the dates

being set forth) soliciting complaints against the Judge (the text of the ads. being quoted).

4. That the Judge enlisted the aid of a friend to negotiate with Petitioners and that he was met with the statements (quoting them) that they could chop the Judge up and were going to do so and that he would have to agree with whatever the Petitioners decided and publicly read a press release he would be off the bench in 60 to 90 days.

5. That the Judge did read the press release in open court.

It is submitted that the complaint herein meets the most rigid standards of specificity, and that the contention of the Petitioners that they did not know what they were called upon to defend presumes a childlike naviete and artless simplicity utterly foreign to the sophistication of these Petitioners as is so clearly apparent in the record and the lower court's opinion.

It is completely obvious that the Petitioners were adequately informed of the charges they were required to defend. It was not incumbent upon the State to plead facts not necessary to establish unprofessional conduct on the part of the Petitioners, or to state the circumstances necessary to prove the facts alleged, or the character of the evidence upon which the State intended to rely, or to anticipate in the complaint matters of defense which the Petitioners might possibly set up. See: *41 Am. Jur. "Pleading"* # 77, page 344-345

It is argued in Sec. IV of the Petition that the totality of the State's action in this case had the effect of denying the Petitioners a fair trial and procedural due process.

Here again they complain of impermissibly vague and broad statements of conduct.

They complain of newspaper accounts of the affair. One wonders if freedom of speech must be extended to attorneys who harass judges by accusing them of criminal

conduct and in connection therewith coerce judges to do their bidding while at the same time newspapers are to be denied freedom of speech in reporting such conduct of attorneys. It is the old, old story that freedom of speech is for me but not for others.

The desperate urgency of their situation has led the Petitioners to make a vicious attack on the ethics of the Chairman of the State Board of Bar Commissioners, a highly respected member of the bar, on the ridiculous grounds that he is guilty of serving conflicting interests for the reason that he is counsel for the Wisconsin Newspaper League, a trade organization whose membership includes the two Milwaukee newspapers which carried stories about the astonishing activities of the petitioners.

There is no showing that these newspapers had any interest in the matter other than their obligation to serve the public's right to know about the petitioners' efforts to subvert the administration of justice in the Milwaukee courts by harassment and coercion of a judge. Certainly neither of the newspapers nor the trade organization were in any way parties to this action.

At page 56 of the petition the petitioners complain that when they were permitted to appear before the State Board of Bar Commissioners they were not told with any specificity as to what they should speak about.

While defendants were permitted to appear before the Board in the course of its investigation, the Wisconsin disciplinary rules do not require that an attorney be given such right, nor it's submitted does the United States Constitution.

When the petitioners appeared before the Wisconsin State Board of Bar Commissioners, they did so as a part of the Board's investigation into their conduct. That hearing was not a preliminary hearing in the sense of a procedural step.

The Board, in instances such as were present at the time of its investigation, often times as a courtesy requests attorneys charged with misconduct to appear before it for the sole purpose of possibily explaining their misconduct. S ch Board hearing is a closed, privileged session held by the Board only to guide it in determining whether or not professional misconduct is present, and if it makes that determination it then determines if the misconduct is of such a grievous nature as to require that a complaint be filed with the Wisconsin Supreme Court, with the resulting hearing before a referee.

The Board might or it might not decide to file a complaint with the Supreme Court as the result of its investigation. Many of these investigations die at that stage, and in no event is any part of the investigational proceedings blanketed into the record after a formal complaint is filed with the Wisconsin Supreme Court. With the filing of the complaint in the Supreme Court the disciplinary process begins, and any complaint of lack of procedural due process in the proceedings before that point is premature.

No useful purpose would be served by unduly prolonging this brief by discussing in any further detail the trivia which petitioners are trying to blow up into alleged denials of procedural due process. Many of these observations of petitioners are based on thier self motivated testimony which the Wisconsin Supreme Court chose not to believe and rejected in favor of the disinterested testimony of the state's witnesses. This was not only the right but the duty of that court in the light of the record.

CONCLUSION

1. The findings of the Wisconsin Supreme Court are fully supported by the evidence as disclosed by the record. It is respectfully submitted that the rule for this court to follow in considering those findings was correctly stated by Justice

Frankfurter in his dissent in *In re Sawyer,* Vol. 360 U. S. Report 622 @ 652; 79 S. Ct. 1376, 3 L. Ed. 2d 1473:

> "We are not empowered to set aside the conclusions of the Supreme Court of Hawaii, affirmed by the Court of Appeals, if its conclusions find reasonable support — that is, if conscientious judges could not unreasonably have reached such a conclusion on the strength of the evidence disclosed by the record and the inferences fairly to be drawn from it."

And later in the same dissent:

> "In examining this record sight must never be lost of the limited scope of our reviewing power. We are only concerned with whether the findings have fair support in the record. If the findings are so supported, we have the right to strike down the suspension only if it transgresses constitutional limits . . . . "

2. Petitioners' defense that their activities were constitutionally protected was determined against them in *Eisenberg et al v. Boardman* (1969) 302 F. Supp. 1360, a decision from which they did not appeal and which is now *res judicata.* That decision specifically denied constitutional protection to speech activities intermingled with an attorney's course of unprofessional conduct.

Quoting from Justice Stewart's concurring opinion, page 646 *Sawyer,* supra:

> " . . . A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech . . . "

3. The judgment of the Wisconsin Supreme Court is not violative of any of petitioners' constitutional rights and there was no denial of due process at any stage of the proceeding.

The petition for a Writ of Certiorari should accordingly be denied.

Respectfully submitted,

RUDOLPH P. REGEZ
1502 10th Street
Monroe, Wisconsin 53566

WARREN H. RESH
402 West Wilson Street
Madison, Wisconsin 53703

Attorneys for Respondent